IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DORMAN FRED TALBOT, JR.,
Petitioner and Appellant,
v.
LAWRENCE E. WILSON,
Respondent and Appellee.

No. 21631

APPELLEE'S BRIEF

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JURISDICTION

Petitioner and appellant has invoked the jurisdiction of this Court under Title 28, United States Code section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the state courts

Appellant was convicted in the Superior Court of the State of California, County of Santa Barbara, of murder in the first degree (Cal. Pen. Code § 187). Pursuant to the verdict of the jury, a sentence of death was imposed. On June 3, 1966, the Supreme Court of California unanimously affirmed the judgment. *People* v.

Talbot, 64 Cal.2d 691, 414 P.2d 633, 51 Cal.Rptr. 417. The United States Supreme Court denied certiorari to review the judgment on January 9, 1967. Talbot v. California, 87 S.Ct. 729.

On February 1, 1967, appellant filed with the Supreme Court of California a petition for a writ of habeas corpus. The petition was denied without opinion on February 8, 1967. In re Talbot on Habeas Corpus, Crim. No. 10803. Appellant sought a writ of certiorari in the United States Supreme Court to review the denial of habeas corpus. Certiorari was denied on June 12, 1967. Talbot v. California, 35 U.S.L. Week 3438.

B. Proceedings in the federal courts.

On February 14, 1967, appellant filed in the United States District Court, Northern District of California, a petition for writ of habeas corpus. Talbot v. Wilson, No. 45649 (N.D. Cal.). After oral argument, the Honorable Lloyd H. Burke, United States District Judge, issued an order denying said petition on February 23, 1967. On said date, appellant filed notice of appeal and Judge Burke issued a certificate of probable cause.

On February 24, 1967, this Court issued an order directing that proceedings on appellant's appeal be held in abeyance pending action by the United States

Supreme Court on appellant's petition for certiorari which, as noted, was denied on June 12, 1967.

STATEMENT OF THE FACTS

The facts are summarized in the opinion of the California Supreme Court, People v. Talbot, 64 Cal.2d 691, 414 P.2d 633, 51 Cal.Rptr. 417 (1966).

APPELLANT'S CONTENTIONS

Appellant has briefed the following contentions on appeal, while disclaiming any intention of waiving other claims raised in the petition below:

1. The jury was given no standards for its guidance in the exercise of its discretion to impose either death or life imprisonment.

2. The prosecutor suggested to the jury that its decision as to penalty should be based in part on an inflammatory photograph.

3. The Supreme Court of California failed to apply the harmless-error standard of Chapman v. California to appellant's claimed errors in regard to:

    a. illegal search and seizure;

    b. failure to give manslaughter instructions;

    c. prosecutorial comment upon appellant's failure to produce witnesses who would testify to his remorse.

SUMMARY OF APPELLEE'S ARGUMENT

I. The absence of standards to guide the jury's decision as to choice of penalty raises no federal question.

II. The prosecutor's argument and the introduction of the photograph referred to therein did not work a denial of due process.

III. The California Supreme Court properly ruled that appellant's claims of error are without merit and properly applied the applicable nonfederal harmless-error rule.

ARGUMENT

I

THE ABSENCE OF STANDARDS TO GUIDE THE JURY'S DECISION AS TO CHOICE OF PENALTY RAISES NO FEDERAL QUESTION

Appellant correctly notes that, under California procedure, the choice of penalty to be imposed on one convicted of first-degree murder is left to the absolute discretion of the jury, and no standards are provided by statute for the jury's guidance. Cal. Pen. Code § 190.1. But appellant's contention that this procedure is unconstitutionally vague or otherwise denies due process is patently without merit, as Judge Burke properly held.

The same attack was levelled against a similar

statute of another state and flatly rejected in Petition of Ernst, 294 F.2d 556 (3d Cir. 1961). But appellant now urges that this discredited claim has been given new life by the recent case of Giaccio v. Pennsylvania, 382 U.S. 399 (1966), which held void for vagueness a state statute permitting a jury to tax costs to a defendant it has acquitted of a criminal charge. The holding thus has no relevance to a statute permitting a jury, without being bound by fixed guidelines, to determine the punishment to be suffered by one duly found guilty of first-degree murder. The Supreme Court expressly stated that:

> "In so holding we intend to cast no doubt whatever on the constitutionality of the settled practice of many States to leave to juries finding defendants guilty of a crime the power to fix punishment within legally prescribed limits." Id. at 405 n.8.

This footnote was recently cited with approval in Spencer v. Texas, 87 S.Ct. 648, 652 (1967). We are willing to take the United States Supreme Court at its word. So were the two courts which have considered appellant's claim in the light of Giaccio. See Maxwell v. Bishop,

257 F.Supp. 710, 716-17 (E.D. Ark. 1966); People v. Seiterle, 65 A.C. 367, 374, 420 P.2d 217, 221, 54 Cal. Rptr. 745, 749 (1967).

A few pages from the history of the death penalty in California will bear out the observation of the court in Petition of Ernst, supra, 294 F.2d 556 (3d Cir. 1961), that vesting in the jury the discretion as to imposition of penalty, without fixed standards, is in all probability more helpful to the accused than would be the procedure of providing standards. Until the 1874 amendment of Cal. Pen. Code section 190, Amendments to the California Codes, 1873-74, p. 457, a conviction of first-degree murder automatically required imposition of the death penalty. From 1874 to 1956, the notion apparently persisted that the death penalty was presumptively proper in all cases of first-degree murder, and that the jury should impose a sentence of life imprisonment only if it should find evidence of extenuating or mitigating facts or circumstances. In holding erroneous an instruction to this effect in People v. Green, 47 Cal.2d 209, 302 P.2d 307 (1956), the California Supreme Court, relying in part upon decisions of the United States Supreme Court stating similar views, determined that, in order to afford maximum protection to the defendant, there should be no

presumptively correct penalty, and the jury should be free to impose either penalty without being restricted by externally-imposed standards. This procedure, which gives the jury free rein to exercise mercy, rather than adhere to the demands of strict justice, can only work to the benefit of one convicted of first-degree murder.

II

THE PROSECUTOR'S ARGUMENT AND THE INTRODUCTION OF THE PHOTOGRAPH REFERRED TO THEREIN DID NOT WORK A DENIAL OF DUE PROCESS

Appellant complains of the introduction of a photograph of the victim's body, which he claims to be inflammatory. The California Supreme Court met this claim by holding that the trial court acted within its discretion in determining whether the probative value of the photograph outweighed any possible prejudicial effect of its admisssion, and that the photograph was relevant and admissible to show the circumstances of the crime and facts in aggravation of the penalty. People v. Talbot, 64 Cal.2d 691, 706, 708, 414 P.2d 633, 643, 644, 51 Cal.Rptr. 417, 427, 428 (1966).

Petitioner has cited no case holding that introduction of allegedly inflammatory photographs in a state trial raises any federal question. But at his insistence, the photograph in question was obtained and

lodged with the Court below. Judge Burke examined it and disposed of appellant's contention in the following words, found on page 2 of his Order:

> "Petitioner next claims that an allegedly inflammatory photograph of the victim's body denied him due process. In view of the state court finding that the probative value of the photograph outweighed the prejudice resulting from their introduction no federal question is presented. Chavez v. Dickson, 280 F.2d 727, 738 (1960). Furthermore, an independent review of the state record reveals that the photograph was relevant and that the probative value of the evidence warranted its reception into evidence."

The photograph in question, along with the complete trial transcripts, has been lodged with this Court. An examination of the photograph will disclose that, while by no means pretty, it was hardly inflammatory to the point of amounting to an arguable denial of due process. The numerous wounds apparent from the photograph could

be used to indicate a grim determination on the part of appellant to effect the death of his victim, and would thus render the photograph proper evidence in aggravation of the penalty. At the same time, the photograph could have been helpful to appellant. As appellant states, "The degree of frenzy evident by the wounds depicted in exhibit 21 may indicate the killer was not within his senses when he killed . . . ." (AOB 4). If so, the photograph was evidence of mental illness not amounting to legal insanity, and would thus tend to militate against the death penalty. Compare Anspacher, The Trial of Dr. de Kaplany (1965), recounting a famous murder trial wherein the jury imposed a life sentence on the basis of evidence of mental illness.

At all events, the issue of the photograph's admissibility has been thoroughly explored and determined adversely to appellant in previous state and federal proceedings. We submit that, on the basis of 28 U.S.C. § 2254(d), and traditional principles of appellate review, there is no basis for overturning the determinations of the California Supreme Court and the Court below.

Also without merit is appellant's contention that the prosecutor's argument, urging the jury to base its decision, in part, on the photograph in question, denied

due process. There was no objection to this argument at trial, and the trial court therefore had no opportunity to rule on its propriety. The Supreme Court of California properly ruled that the argument "falls within the purview of section 190.1 relative to the circumstances surrounding the crime and matters in aggravation of the penalty." People v. Talbot, 64 Cal.2d 691, 711, 414 P.2d 633, 646, 51 Cal.Rptr. 417, 430 (1966). Appellant's contention that the argument affected the "impartiality" of the jury (AOB 5) is not well taken. A jury's "impartiality" or the lack thereof depends upon its preexisting attitudes and opinions, and those developed as a result of matters brought to the jury's attention otherwise than through the presentation of evidence, the argument of counsel, and the remarks of the court. It relates to the jury's ability to weigh fairly, based upon its preexisting attitudes, the evidence and arguments presented to it, and is, by its very nature, not affected by the evidence and arguments themselves.

III

THE CALIFORNIA SUPREME COURT PROPERLY RULED THAT APPELLANT'S CLAIMS OF ERROR ARE WITHOUT MERIT AND PROPERLY APPLIED THE APPLICABLE NONFEDERAL HARMLESS-ERROR RULE

Appellant contends that the California Supreme Court found three errors in his trial but affirmed despite them,

applying the state standard of harmless error, rather than that subsequently laid down by the United States Supreme Court in Chapman v. California, 87 S.Ct. 824 (1967). But there was clearly no error found by the California Supreme Court and, in any event, application of the state rather than federal standard of harmless error was proper.

Appellant claims that the California Supreme Court held that the admission of certain evidence, which appellant claims was the product of an illegal search and seizure, was harmless error. This is not correct. The record showed that a police officer had examined appellant's Chevrolet automobile and observed blood stains on the trunk. On the basis thereof, the vehicle was impounded, its trunk having first been sealed, and held for later scientific examination. This examination disclosed certain evidence in the trunk which was admitted at trial. The California Supreme Court, acting on the assumption that a warrantless search had been made, determined the search to be legal, and that appellant had waived any objection thereto, and observed that, in any event, appellant had not shown prejudice from its admission. People v. Talbot, 64 Cal.2d 691, 708-09, 414 P.2d 633, 644-45, 51 Cal.Rptr. 417, 428-29 (1966). The determination that the search was proper was subsequently vindicated by the

United States Supreme Court in Cooper v. California, 87 S.Ct. 788 (1967), which held that a properly-impounded vehicle may, even in the absence of a warrant, be searched for evidence of any offense related to the reason for its being impounded. Because of the bloodstains found on the exterior of the vehicle in the instant case, there can be no doubt that it was properly impounded.

As noted above, the California Supreme Court apparently assumed that the search of the Chevrolet was made without a warrant, since the record failed to indicate that a warrant had been obtained. This is explainable by the fact that there was no objection to the search and seizure, and consequently no necessity for the prosecution to produce warrants. But there actually were warrants. Attached herewith, marked "Exhibit A" through "Exhibit F," and incorporated herein by reference, are certified copies of warrants, together with supporting affidavits, returns, and inventories, which authorized searches of appellant's Chevrolet and a 1960 Rambler also owned by him for the items of physical evidence the admission of which he now assigns as error. This Court may take judicial notice of these documents. See Jones v. Attorney General, 278 F.2d 699, 701 (8th Cir. 1960). These items are listed in the Talbot opinion, 64 Cal.2d at 708-09,

414 P.2d at 645, 51 Cal.Rptr. at 429.

These warrants not only show that the search was unquestionably valid, but demonstrate why there was no issue of illegal search and seizure raised at trial. Thus, any question of a misapplication of the harmless error rule is irrelevant. Also irrelevant is any question of whether, by failing to object to the admission of the evidence, appellant deliberately forewent the privilege of seeking to vindicate his search and seizure claims in the state courts, within the meaning of Henry v. Mississippi, 379 U.S. 443 (1965). That question arises only when a state court applies its contemporaneous-objection rule as a ground for failure to consider the claims. Here, the California Supreme Court, despite the absence of an objection, not only considered the claim but properly held it to be without merit.

Appellant next contends that the California Supreme Court applied an impermissible standard in holding the failure to give his requested instructions on manslaughter to be harmless error. In the first place, the California Supreme Court did not hold the failure to be error, but refused to consider the argument on the ground failure to give the instructions could not have prejudiced appellant. People v. Talbot, 64 Cal.2d 691, 711, 414 P.2d 633, 646, 51 Cal.Rptr. 417, 430 (1966). In the second place,

the claimed error was purely one of state law. See Poulson v. Turner, 359 F.2d 588 (10th Cir. 1966), which held that an error in failing to instruct on a lesser degree of murder does not raise any federal question. As stated in Chapman, "The application of a state harmless-error rule is, of course, a state question where it involves only errors of state procedure or state law." 87 S.Ct. at 826.

Further, there was no error under state law. The gist of appellant's claim is that he had presented evidence of diminished mental capacity to harbor malice, the mental state necessary to commit murder. It was held reversible error to refuse instructions that such evidence, if believed, would entitle an accused to a verdict of manslaughter, in People v. Conley, 64 Cal.2d 310, 411 P.2d 911, 49 Cal.Rptr. 815 (1966). It has never been held, however, that such instructions must be given sua sponte. In the instant case, all of the manslaughter instructions refused are set out at pages 21 through 25 of the Clerk's Transcript. It will be noted that they all relate to voluntary manslaughter, which under California law is the unlawful killing of a human being without malice, committed upon a sudden quarrel or heat of passion. Cal. Pen. Code § 192. There was absolutely no evidence in the instant

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case showing or tending to show that the crime could constitute voluntary manslaughter under this definition. The type of manslaughter of which appellant claims he produced evidence is one not even recognized by statute, but only by judicial decisions, such as Conley. Assuming, arguendo, that it might have been appropriate to give instructions of the kind approved in Conley, to the effect that petitioner's mental state might have been such as to prevent him from harboring malice, no such instructions were requested. Therefore, petitioner cannot claim error in failure to give them.

Appellant's last contention is that the prosecutor commented upon his failure to produce witnesses who would testify to his remorse, that this comment violated Griffin v. California, 380 U.S. 609 (1965), and that the California Supreme Court held this comment to be harmless error, without applying the Chapman rule. In the first place, the California Supreme Court held this not to be error at all, much less harmless error. In the second place, appellant's assertion that the comment violated Griffin was properly answered by the California Supreme Court:

> "Defendant complains that the remark constituted a comment on his failure to testify, in that the

> witnesses whom he was supposed to call would testify to what he told them. The remarks were, however, in terms of how defendant appeared and acted and were remote from an intimation that defendant himself should have testified." People v. Talbot, 64 Cal. 2d 691, 712, 414 P.2d 623, 647, 51 Cal.Rptr. 417, 431 (1966).

Indeed, we are unable to see how comment on an accused's failure to produce evidence of self-serving hearsay statements made to others can be considered to impinge upon his privilege against self-incrimination, within the meaning of Griffin. The "letter and spirit" of Griffin is that comment upon an accused's failure to testify has the effect of inducing him to take the stand and thereby waive his privilege against self-incrimination. The comment in the instant case could not conceivably have such an effect.

Appellant has indicated that he will rely on the arguments presented in his Points and Authorities in support of the petition below as his argument in support of contentions raised below but not briefed in this Court. Out of fairness, appellee will similarly rely on his Points and Authorities in support of the return

below as his answer to these contentions.

CONCLUSION

There being no merit in appellant's contentions, we respectfully request that the order denying the writ be affirmed.

DATED: July 11, 1967.

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CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing brief is in full compliance with those rules.

DATED: July 11, 1967.

George R. Nock
GEORGE R. NOCK
Deputy Attorney General

EXHIBITS